CHI LIUNG HOLDINGS SDN BHD

v.

L & T REALTY SDN BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
ZAKARIA YATIM JCA
VC GEORGE JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: B-02-23-95]
27 DECEMBER 1999

LAND LAW: *Sale of land - Sale by order of court - Public auction - Terms and conditions of sale - Extension of time to pay balance purchase price - Whether there was variation or alteration of conditions of sale - Whether court could grant extension of time - Whether sale was ultra vires - Whether failure to give notice fatal to sale*

The court ordered the appellant's land to be sold by public auction. The 1st respondent purchased the land. According to the terms of the sale, the balance purchase price was to be paid within 90 days from the date of the auction. Before the expiry of the 90 days, the 1st respondent wrote a letter to the senior assistant registrar applying for an extension of time to pay the balance purchase price. The senior assistant registrar granted the extension. The appellant filed an application for orders that the sale of the land and the extension of time be set aside. The grounds for the application were: (i) the order was *ultra vires* the National Land Code 1965; (ii) the appellant was never notified about the 1st respondent's application for the extension of time; and (iii) the court had no jurisdiction to grant an extension of time.

Held:
Per Zakaria Yatim JCA

[1] The extension of time to pay the balance purchase price was granted in accordance with the terms and conditions of the sale. There was no alteration or variation of the conditions of sale.

[2] The situation in *Malayan United Finance Bhd, Johore Bharu v. Liew Yet Lan* and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* was different from that of the instant case. In those two cases, time was of the essence of the contract whereas it was not so in this case.

[3] Failure to give the draft notice of the application to extend time to pay was not fatal to the validity of the sale.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Tanah perayu dijual secara lelongan awam atas arahan mahkamah. Responden pertama membeli tanah tersebut. Menurut terma-terma penjualan, baki harga belian hendaklah dibayar dalam masa 90 hari dari tarikh lelong. Sebelum tempoh 90 hari itu tamat, responden pertama menulis sepucuk surat kepada penolong kanan pendaftar memohon

Diputuskan:
Oleh Zakaria Yatim HMP

[1] Perlanjutan masa untuk membayar baki harga belian telah dibenarkan mengikut terma-terma fasal 6, Syarat-Syarat Jualan. Tiada sebarang perubahan atau pindaan pada syarat-syarat jualan.

[2] Adalah jelas bahawa dalam situasi ini bahawa *Malayan United Finance* and *M&J Frozen Food* adalah berbeza dari kes ini. Dalam kedua-dua kes ini, masa adalah intipati kontrak tetapi ianya tidak di dalam kes ini.

[3] Kegagalan untuk memberi notis draf permohonan untuk melanjutkan masa tidak memudaratkan keesahan penjualan tersebut.

[Rayuan ditolak.]

Case(s) referred to:
Development & Commercial Bank Bhd, Johore Bahru v. Kim Ming Chin [1991] 1 CLJ 732 ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(dist)***
Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1990] 1 MLJ 317 ***(dist)***
Siland Sdn Bhd v. M & J Frozen Food Sdn Bhd [1990] 1 CLJ 1227 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 206, 256, 258(1)

For the appellant - George Proctor; M/s YS Woo & Proctor
For the respondents - En Thangaraj; M/s Thangaraj & Assoc

[Appeal from High Court, Shah Alam; Code No: 24-316-90]

Reported by Izzaty Izzuddin

JUDGMENT

Zakaria Yatim JCA:

The appellant, Chi Liung Holdings Sdn. Bhd. (Chi Liung) filed an application in the High Court for an order that the sale of its land held under Grant 13138, Lot No. 6891, Mukim of Kelang to L & T Realty Sdn Bhd. (L & T Realty) be set aside. Chi Liung also applied that the order

of the senior assistant registrar granting L& T Realty an extension of time of 90 days to pay the balance of the purchase price of the said land in the sum of RM1,953,000 be set aside. Ranita Hussein, JC dismissed the application with costs.

On 27 April 1995, Chi Liung appealed to this court. This court, by a unanimous decision, dismissed the appeal with costs.

On 7 August 1995, Chi Liung filed an application for leave to appeal to the Federal Court. By an order dated 7 August 1995, the Federal Court granted the leave. The Federal Court also ordered that L & T Realty "... disekat daripada memperolehi milikan kosong bagi harta tanah di bawah No. Geran 13138 No. Lot 6891 dalam Mukim Kelang ..." pending the disposal of the appeal.

On 18 August 1995, Chi Liung's solicitors wrote a letter requesting for grounds of judgment. Copies of the letter were sent to the other members of the panel which heard the appeal. Neither party communicated to this court since that letter was written. Suddenly, on 29 April 1999, Messrs. Thangaraj & Associates, solicitors of L & T Realty wrote a letter to my secretary requesting for my grounds of judgment. The two other members of the panel had already retired.

I am, therefore, writing my own grounds of judgment as requested by Messrs. Thangaraj & Associates.

The facts of the case are that Chi Liung was the owner of the said land. It obtained a loan from Public Finance Bhd. (Public Finance) and charged the said land to the latter. Chi Liung defaulted in paying the loan and Public Finance obtained an order for the sale of the said land by public auction.

The sale took place on 5 July 1994. The successful bidder was L & T Realty, who paid a deposit of RM217,000. According to the terms and conditions of the sale, the balance price of RM1,953,000 was to be paid within 90 days, that is, before 4 October 1994. Before the expiry of that date, L & T Realty's solicitors wrote a letter on 22 September 1994 to the senior assistant registrar, High Court, Shah Alam applying for extension of time for another 90 days to pay the balance price. The senior assistant registrar granted the extension in his own hand writing on 10 October 1994. Consequently L & T Realty paid the balance price on 9 December 1994.

In its affidavit in support of the application to set aside the order for extension of time, Chi Liung stated that it was never notified that L & T Realty applied for extension of time. It contended that the order granting the extension of time was *ultra vires* the National Land Code. It also stated that the court had no jurisdiction to grant an extension of time.

At the hearing of the appeal before this court, the only issue raised by Chi Liung's counsel, Mr. George Proctor, was whether the senior assistant registrar was right in granting L & T Realty an extension of time for another 90 days to pay the balance price of the said land. He referred to s. 258(1) of the National Land Code which states that where an order for sale had been made, it was the duty of the registrar of the court to serve a copy of the order on the charger. He said that his client was not aware of any extension of time. He argued that since his client was not told about the extension of time, the senior assistant registrar should not have made the order. He then asked this court to cancel the sale of the said land and order a new auction to be held. In support of his argument, Mr. Proctor cited *M & J Frozen Food Sdn. Bhd. & Anor v. Siland Sdn. Bhd. & Another* [1994] 2 CLJ 15; *Malayan United Finance Bhd. Johore Bahru v. Liew Yet Lan* [1990] 1 MLJ 317; and *Development and Commercial Bank Bhd. Johore Bahru v. Kim Ming Chin* [1991] 1 CLJ 732.

Mr. Thangaraj, counsel for L & T Realty, submitted that under cl. 6 of the conditions of sale, the registrar had the power to grant an extension of time. He distinguished *Malayan United Finance* and *M & J Frozen Food* from the present case. He said that in *Malayan United Finance,* there was no provision for extension of time in the condition of the sale. In *M & J Frozen Food,* there was a variation of the terms of the conditions of the sale.

Before dealing with the issue of the extension of time, it is relevant to refer to the earlier orders of the court regarding this matter after Chi Liung had defaulted in paying its loan to Public Finance. By an originating summons dated 3 September 1990 Public Finance had applied to the High Court in Shah Alam for the sale of the said land by Public Auction under s. 206 of the National Land Code 1965. On 21 April 1993, Mahadev Shanker J (as he then was), after hearing the submissions of both counsel for Public Finance and for Chi Liung made an order that the said land "dijual secara pelelongan awam di bawah arahan mahkamah ini selaras dengan s. 256 Kanun Tanah Negara 1965 untuk pembayaran jumlah sebanyak RM5,329,397.33 setakat 21 April 1993 dengan faedah dalam itu pada kadar 12.75% setahun kiraan bulanan mulai 22 April 1993 hingga ke tarikh penyelesaian." The order also stated that the sale was to take place on 6 September 1993.

On 26 April 1993, Public Finance filed a summons for direction in the High Court Shah Alam. A copy of the summons was addressed to Chi Liung. On 30 June 1993 the senior assistant registrar made an order. According to the order Chi Liung's counsel did not appear at the hearing of the summons of direction. On 19 April 1994, the senior assistant registrar made another order stating that the new date for the auction was 5 July 1994. The Public Auction duly took place on 5 July 1994.

It is clear that the application before Mahadev Shanker, was duly served on Chi Liung because the order of the learned judge expressly mentioned that Chi Liung's counsel made his submission before the learned judge. The summons for direction was addressed to Chi Liung but according to the order of the senior assistant registrar dated 30 June 1993, only counsel from Public Finance was present at the hearing. The subsequent order of the senior assistant registrar dated 19 April 1996 mentioned that the solicitor for Chi Liung was absent.

In my opinion, Chi Liung was duly informed or aware of the proceedings for the sale of the said property. Chi Liung was also aware that the date of auction as 5 July 1994. In para. 3 of its affidavit affirmed on 24 November 1994, it stated that "The plaintiff had obtained an order for the sale of the said property and on 5 July 1994 the said property came up for auction." I find that the proceedings up to the date of auction had complied with s. 256 of the National Land Code.

I shall now discuss the issue appropos the extension of time of 90 days to pay the balance price.

The public auction was advertised in the local newspapers fourteen days before the date of sale. After the Public Auction, Chi Liung knew who was the successful bidder at the Public auction. In its affidavit affirmed on 24 November 1994, it stated that the auction price was RM2,170,000 cent and that a deposit of RM217,000 was paid by the successful bidder. The affidavit also exhibited a copy of the Proclamation of Sale together with the conditions of sale. In my view Chi Liung knew the terms of the conditions of sale. Indeed, the learned judicial commissioner had stated in her grounds of judgment, that it was not in dispute that Chi Liung was aware of the terms of the conditions of sale.

In its affidavit dated 24 November 1994, Chi Liung did not challenge the validity of Condition 6 of the conditions of sale. It merely stated that the extension of time for 90 days was *ultra vires* the National Land Code. Condition 6 states:

> 6. The balance of the purchase money shall be paid in by the purchaser within ninety (90) days from the date of the sale to the Senior Assistant Registrar, High Court, Shah Alam by bank draft. If the purchaser fails to comply with this condition, the deposit shall be forfeited to the plaintiff unless an agreement to extend the time is obtained from the plaintiff. Upon getting the consent to forward it to the Senior Assistant Registrar for approval.

Clause 6 expressly allowed the purchaser (L & T Reality) to extend the time to pay the balance of the purchase price provided that the vendor (Public Finance) agreed to it. Once there was such an agreement, the matter could be forwarded to the senior assistant registrar for approval.

As already stated, L & T Realty, wrote to the senior assistant registrar on 22 September 1994 for the extension of time. In that letter L & T Realty mentioned that Public Finance had no objection to the extension of time. By a letter dated 15 September 1994, Public Finance stated that it agreed to allow L & T Realty an extension of time of 90 days to pay the balance of the purchase price. The senior assistant registrar gave his approval on 10 October 1994.

In my opinion, the extension of time for 90 days to pay the balance price was granted to accordance with the terms of cl. 6. There was no variation of the conditions of sale.

In *Malayan United Finance,* condition 7 of the conditions of sale provided that the purchaser had to pay the balance of the purchase money within 30 days from the date of the sale and "time shall be the essence" of the sale contract. In his judgment in that case VC George J (as he then was) said:

> In my judgment in the face of condition 7, particularly with the expressly emphasized provision thereon that time shall be the essence of the contract, and in the face of condition 19, the learned Senior Assistant Registrar had no jurisdiction to entertain the application to extend the time for completion without the consent of the chargee.

In *Siland Sdn. Bhd v. M & J Frozen Food Sdn. Bhd.* [1990] 1 CLJ 1227, the sale of the charged land was done by public auction. Richard Talalla, JC decided that the purchaser was not entitled to an extension of time. The learned judicial commissioner (as he then was) said at p. 1228:

> Under Clause 7 of the special conditions, Frozen was obliged to pay the balance of the purchase money into court ... within 30 days of the date of the sale ... and in this respect time was the essence of the contract. Frozen Food failed to do so.

Frozen Food appealed to the Supreme Court. See *supra.* The Supreme Court dismissed the appeal. In delivering the judgment of the Supreme Court, Wan Yahya SCJ said at p. 24:

> In our present appeal, the effects of extending the time of payment is to cause a material change in the Condition of Sale and thus render it no longer in accordance with or within the terms of the original order ... Consequently, the amended conditions of sale bearing some different terms or directions from the original Conditions has to be served again in accordance with s. 258(1)(a) of the National Land Code on the charger. Failure to do so is a clear transgression of the statutory provisions of that section.

It is clear that the situations in *Malaya United Finance* and *M & J Frozen* are different from the present case. In those two cases, time was of the essence of the contract. This was not so in the present case. Here, there was a strict adherence of Condition 6. There was no alteration or variation of Condition 6. I agree with Ranita Hussein JC, that "failure to give the draft notice of the application to extend time is not fatal to the sale."

For the reasons stated above, I dismissed the appeal with costs.